## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
VS.	)	No. 04 C 5000
MICHAEL V. WILKINS,	)	
Defendant.	)	

## MEMORANDUM OPINION AND ORDER

Defendant claims that his counsel was ineffective by not perfecting an appeal. What counsel was supposed to appeal is somewhat uncertain: defendant acknowledged what he did in a lengthy recitation in the plea agreement. But his counsel would be ineffective if defendant let him know of a desire to appeal, even though no good grounds for doing so existed.

But a hearing made it clear that counsel was unaware of any desire by defendant to appeal. Defendant signed a waiver of appeal on the day of sentencing. He was advised by the court that he had ten days to file a notice of appeal. According to defendant he changed his mind and called counsel in an effort to initiate an appeal. He recalls that he did not reach counsel, but left a message asking him to return the call. He does not recall if he said anything about an appeal when he left the message.

Counsel testified that he never got the message. Customarily, he testified, his secretary makes a written note of a call that needs to be returned and gives it to him, and he received no note of a call from defendant. Perhaps defendant's recollection is faulty. Perhaps counsel's secretary mislaid any note. In any event, counsel was unaware of defendant's interest in pursuing an appeal and he did not call defendant. Defendant was out on bond. He could have gone to his counsel's office, written him a letter or gone to the courthouse and written out a one-sentence notice of appeal himself.

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The ten days went by without counsel becoming aware of defendant's change of mind.

We cannot conclude that counsel was ineffective for failing to do something he was unaware defendant wanted done. Accordingly, we deny the issuance of a certificate of appealability.

JAMES B. MORAN

Senior Judge, U. S. District Court

<u>Parl 17</u>, 2006.